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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. .....

METRO BOLT AND FASTENER CORP.,
Petitioner,

vs.

WILLIAM and JEAN COATS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

CITATIONS TO OPINIONS BELOW

The opinion of the Tennessee Court of Appeals is unreported, as yet, but is set forth at page 12 of Petitioner's Appendix.

JURISDICTION

The jury verdict of January 10, 1974, was affirmed by the trial court without comment on January 28, 1974. A final order of judgment was entered on January 30, 1974, and plaintiff's motion for a new trial was overruled on April 20, 1974 without opinion. The Tennessee Court of Appeals entered an opinion on June 27, 1975, and the Tennessee Supreme Court denied certiorari on November 17, 1975. This Court granted an extension of time to March 16, 1976, by order dated February 13, 1976. Jurisdiction of the Court is invoked by petitioner under Title 28, Section 1257(3), United States Code.

QUESTIONS PRESENTED

I. Whether or not due process requirements were denied where the plaintiff's case was heard and the trial continued over the holiday season for forty days, when the defendant's case was put in, where the jury requested, during deliberation, the subject matter of the plaintiff's case, the contract exhibit?

II. Whether or not undue prejudice against a foreign corporation is shown where a local jury ignores the admissions of breach of contract by defendant, counter-plaintiff's own testimony and find against the plaintiff and for defendant substantial damages in the face of defendant's admitted breach?

BLEED THROUGH

STATEMENT OF FACTS

This was an action for breach of contract. Metro Bolt and Fastener Corp., a Michigan corporation, filed suit in Chancery in the State of Tennessee, Wilson County Chancery Court, February 16, 1973, alleging that William and Jean Coats breached a contract of employment with the Corporation by refusing and failing to carry out duties under the contract.

By order of April 11, 1973, the Chancery temporarily enjoined defendants from, *inter alia,* directly or indirectly engaging in competitive sales against plaintiff within a specified territory. Defendants denied any breach on their part and counterclaimed alleging that the foreign corporation breached the contract of employment with William Coats and wrongfully terminated his employment.

The local defendants demanded a jury trial, which was granted by the Chancellor. The case was tried for two days in November of 1973 and was recessed by the Court until January of 1974. Trial was completed on January 8, 9 and 10, with the presentation of the defendants' case and counterclaim at that time.

The Chancellor submitted several issues of fact to the jury. The jury found (1) that a contract of employment existed between Metro Bolt Fastener Corporation and William Coats; (2) that no contract of employment existed between Metro Bolt and Fastener Corporation and Jean Coats; (3) that the employment contract between plaintiff and William Coats was breached by plaintiff; (4) that William Coats sustained $27,500.00 in damages as a result of the breach; (5) that William Coats was terminated by plaintiff on or about February 12, 1973, and (6) that William Coats was due $600.00 in salary for all or part of February 1973.

During deliberations the jury requested the subject matter of plaintiff's cause: the contract of employment. This request was denied by the Chancellor.

During the course of the trial, the defendant, William Coats, specifically admitted breaching the contract as charged by the plaintiff (Appendix A, p 11) by not submitting itineraries or work schedules as called for in the contract. The Corporation assigned error to the last two facts. Following entry of the final order of judgment on January 30, 1974, plaintiff timely moved for a new trial which motion was overruled on April 20, 1974.

On June 27, 1975, the Opinion of the Court of Appeals of Tennessee, Middle Section at Nashville was filed. The Court of Appeals took the position that "the Chancellor was correct in refusing the jury's request, to take the contract between the parties into the jury room:

> "Our cases do not permit the jury to take exhibits to the jury room during deliberations on the grounds they are likely to be given undue weight as compared with other evidence." [Appendix B, p. 16]

The court further opined on the second issue that prejudice against the foreign corporation was not evidence since the jury did not give all of the damages that it could have given to the local counterclaimant. (Appendix B, p. 15).

The Corporation then timely sought a petition for writ of certiorari in the Supreme Court of Tennessee at Nashville, the previously stated issues being raised by assignments of error. On November 17, 1975, an order denying the petition was filed.

ARGUMENT

I.

REFUSAL OF THE JURY'S REQUEST TO SEE A CONTRACT EXHIBIT IN A CONTRACT CASE WHERE FORTY DAYS HAS INTERVENED FROM PLAINTIFF'S CASE TO DELIBERATIONS IS TO DENY THE PLAINTIFF (CROSS-DEFENDANT) A FAIR HEARING AND CONSEQUENTLY DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE U. S. CONSTITUTION.

It was found by the Tennessee Court of Appeals that a rule exists in Tennessee that trial exhibits are not to be taken into the jury room during deliberations on the basis that the exhibits would tend to outweigh other evidence and therefore tend to be prejudicial (Appendix B, p. 16); *Shappley v. Graves*, 9 Tenn. App. 567 (1929); *Sinard v. Harris*, 2 Tenn. Civ. App. 486 (1911).

In the instant case the delay of the trial over the holiday season for a period of forty (40) days tended to cause the jury to forget the corporation's proofs including the contract, hence the jury's request for the contract itself. To deny the request was virtually to deny the corporation its right to have its proofs before the jury during deliberations. This turns a rule designed to safeguard against undue influence into a rule which is by itself an engine of oppression.

The reason for this common law rule is reviewed in *Higgins v. Los Angeles Gas & E. Co.*, (Cal.) 115 P. 313 (1911) where it is stated:

> "The only express provision of the law bearing upon the right of juries to use exhibits, or upon the right of the court to permit juries to use exhibits,

in their deliberations is found in §612 of the Code of Civil Procedure, and this has to do solely with "papers" which have been introduced in evidence. One curious in such matters can learn from the common law why this section of the Code was adopted, and why also it is confined to papers. The common-law rule was that jurors were allowed to take with them in their deliberations only such instruments as were under seal, and that they were not permitted to take with them any unsealed papers excepting by consent of the parties. The reason for this, according to Lord Hale and Lord Gilbert, was that jurors were supposed to be, and for the most part were, unlettered men. They could not read. A writing conveyed to them nothing. But in the case of sealed instruments, as these jurors were drawn from the vicinage, they were quite apt to be familiar with the armorial bearings of their neighborhood great from which the seals were derived. An instrument under seal, therefore, spoke for itself, and the jurors were permitted to take such instruments with them, not for the purpose of reading the instrument itself, but rather for the purpose of veryfying their recollection of the seal, and testing its genuineness. The curious inquirer will also find that it was not uncommmon for one who had not arisen to the dignity of possessing an armorial bearing, to set the stamp of his teeth as his seal upon the instrument, and hence the old time phrase of 'proving it to (by) his teeth.' But in the case of other exhibits not involving a knowledge of reading or writing, it seems to have been a matter of discretion with the court to allow the jury to take them into the jury room in aid of their deliberations. This rule, as to

> papers, however, was in force at a time when learning in letters was so rare, and the premium upon such learning so high that a felon could save his neck by proving his ability to read a verse of Scripture. It was to save the possibility of the question arising in this state as in 1812 it arose in the state of Pennsylvania (Alexander v. Jameson, 5 Binn. 238), that the section of the Code was adopted."

The effect of this ancient but hard and fast rule was to deprive the Corporation of due process with respect to its case in chief as well as its defense to the counterclaim, by preventing the jury from examining the very document in the English language and put in question by the trial itself. States have been given great leeway in control over civil procedure, unless,

> "such procedure . . . work(s) a denial of fundamental rights or conflict(s) with specific and applicable provisions of the Federal Constitution, . . . " .
> *Brown v. New Jersey,* 175 US 172, 175 (1899).

It is contended by petitioner that the denial of examination of evidence under the circumstances of delay in this case is equivalent to a denial of the right to put in evidence before the trier of fact, a fundamental to a fair trial, *Goldberg v. Kelly,* 397 U.S. 254, 271 (1970).

II.

UNDUE PREJUDICE AGAINST A FOREIGN CORPORATE PLAINTIFF IS SHOWN WHERE A LOCAL DEFENDANT ADMITS A BREACH OF CONTRACT AND THE JURY NEVERTHELESS AND WITHOUT THE SUPPORT OF EVIDENCE FINDS FOR THE DEFENDANT ON A COUNTERCLAIM AND AGAINST THE CORPORATE PLAINTIFF ON ITS ORGINAL CLAIM.

The trial court in this cause affirmed a judgment against the corporation in spite of admissions indicating that the defendant as alleged had breached the contract himself.

The corporation contends that the equal protection clause of the Fourteenth Amendment is available to a foreign corporation, *Santa Clara County v. Southern Pacific R. Co.*, 118 US 394, 396 (1886), although there appears to be a current trend in the Court's decisions to restrict this right to real persons and in historical terms of racial equality, as under the removal statutes which rest upon the same foundation as the Fourteenth Amendment itself; *State of Georgia v. Rachel*, 384 US 780, 792 (1966).

Assuming the right of the corporation to insist on equal protection, it is asserted that a confirmed verdict which ignores the evidence is a state action proscribed by the Fourteenth Amendment.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Telephone: (313) 355-5643
Counsel for Petitioner

Dated: March 2, 1976.

APPENDIX A

TRANSCRIPT OF TRIAL

(767) Q. From $1,200.00 to $1,400.00 a month?

A. At one time. I was supposed to have gotten . . .

Q. Did you complain about that increase?

A. I was supposed to have gotten it started in November. I complained . . . did I complain about the increase once I got it?

Q. Did you complain about him giving you a raise?

A. No.

Q. Now, on February 11, 1973, did you have a telephone conversation with Mr. Bunting?

A. He called me, yes.

Q. And during that telephone conversation did he ask you about an itinerary?

A. I believe he did.

Q. Did he ask you why you were not furnishing him with itineraries?

A. I don't recall.

Q. You don't recall that?

A. No, sir.

Q. Well, was that sort of a constant thing that he kept after you about, where were you, were (sic) are you going, give me an itinerary so I can . . .

A. Only at the last after . . . he began to talk about this at the very end—not up until then.

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APPENDIX B

OPINION

(Court of Appeals—Nashville, Tennessee)
(Filed June 27, 1975)

Metro Bolt and Fastener Corporation Plaintiff-Appellant, vs. William Coats and wife, Jean Coats Defendants-Appellees.	Wilson Equity

This is an action for breach of contract. Metro Bolt and Fastener Corporation filed suit in the Chancery Court for Wilson County on February 16, 1973, alleging that William Coats and Jean Coats breached a contract of employment with the Corporation by refusing and failing to carry out duties under the contract. It sought damages and injunctive relief. By Order of April 11, 1973, the Chancellor temporary enjoined defendants from, *inter alia,* directly or indirectly engaging in competitive sales against plaintiff within a specified territory.[1]

Defendants denied any breach on their part and counterclaimed,[2] alleging that the Corporation breached the contract of employment with William Coats and wrongfully terminated his employment. Defendants demanded a jury trial, which was granted by the Chancellor. The case was tried for two days in November of 1973 and, by agreement of the parties, was recessed until January of 1974. The trial was completed on January 8, 9, and 10.

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[1] The record fails to reflect that plaintiff made the proper injunction bond or that the temporary injunction ever issued.

[2] The counter-claim was designated a cross-claim by the parties.

BLEED THROUGH

The Chancellor submitted several issues of fact to the jury. The jury found (1) that a contract of employment existed between Metro Bolt and Fastener Corporation and William Coats, (2) that no contract of employment existed between Metro Bolt and Fastener and Jean Coats, (3) that the employment contract between plaintiff and William Coats was breached by plaintiff, (4) that William Coats sustained $27,500.00 in damages as a result of the breach, (5) that William Coats was terminated by plaintiff on or about February 12, 1973, and (6) that William Coats was due $600 in salary for all or part of February, 1973.

Before the entry of the final decree, plaintiff filed a motion alleging that the issues were improper for consideration and determination by the jury and asking the Chancellor to treat the verdict as advisory. The motion was overruled on January 28, 1974, at which time the Chancellor held that the issues submitted were proper issues for the jury to pass upon and affirmed its findings. The final order of judgment was entered on January 30, 1974. Plaintiff's subsequent motion for a new trial was overruled on April 20, 1974, after which plaintiff prayed for, was granted, and perfected this appeal.

Appellant contends that the Chancellor erred in submitting the cause to a jury.[3] It is argued that there is no right to a jury trial in Chancery Court and that appellees' jury demand should have been denied or the verdict treated as advisory only.

Prior to the filing of this action, the statute granting the privilege of a jury trial in equity cases in Chancery

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[3] In the same assignment of error a second complaint was also raised, but it was not called to the Chancellor's attention in appellant's motion for a new trial. Consequently we are precluded from considering it. *Cohen* v. *Cook*, 62 Tenn. App. 292, 462 S.W.2d 502 (1969); Court of Appeals Rule 12(5).

Court was repealed. Tenn. Pub. Acts 1972, Ch. 565. No constitutional or common law right to a jury exists in such cases. *Marler* v. *Wear,* 117 Tenn. 244, 96 S.W. 447 (1906); *Neely* v. *State,* 63 Tenn. 174 (1874).

A complaint seeking damages for breach of contract is, however, an action at law. Parties have a right to demand a jury when legal relief has been sought, even if the case is to be tried in Chancery Court, under its concurrent jurisdiction over certain civil causes. *Ashe* v. *State ex rel. Shriver,* 518 S.W.2d 360 (Tenn. 1975). This is true even when the request for legal relief is coupled with an application for an equitable remedy from the Chancellor.

It is further contended that the verdict is "contrary to the law and the evidence and that the court erred in allowing the jury verdict to stand and in giving the Cross-Complaint damages in the amount of $28,100.00 against the Cross-Defendant." It is well settled that an assignment that a verdict is contrary to the law and evidence is insufficient to raise any issue for determination on appeal from a jury verdict that has been approved by the trial judge. *Netherly* v. *Hornbuckle,* 484 S.W.2d 542 (Tenn. App. 1972). The reason is that in a jury case this Court may not weigh the evidence but may only determine if there is any material evidence to support the verdict. *Morgan* v. *Dillard,* 61 Tenn. App. 519, 456 S.W.2d 359 (1970). An examination of this record discloses material evidence to support the conclusions reached by the jury.

Appellant argues that the verdict of the jury demonstrates passion, caprice, and prejudice and is not supported by the evidence. We find that the amount of damages awarded by the jury is within the range of verdict which a reasonable and impartial jury could have returned and thus does not support an inference of an improper state

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of mind by the jurors. The evidence shows that the contract of employment between appellant and William Coats was for an initial period of three years and that 24½ months of that term remained at the date of the breach. At that time Coats was earning $1,400.00 per month salary and had previously earned commissions averaging approximately $100.00 per month. Appellee was entitled to recover damages for the whole term of the contract. *Jeffers* v. *Stanley,* 486 S.W.2d 737 (Tenn. 1972). Since the jury verdict of $27,500.00 was an award of $1,122.45 per month and is less than Coats would have earned under the contract it does not appear on its face to evince passion, prejudice, or caprice in favor of Coats. Appellant contends, however, that the jury failed to consider what Coats might have earned after the date of trial. Under our cases, the burden is on the employer to establish that by the exercise of due diligence the discharged employee could mitigate his damages. *Jeffers* v. *Stanley, supra.* The record shows that trial counsel for appellant did not cross-examine either William Coats or Jean Coats as to other employment or earnings. When counsel for Mr. Coats attempted to inquire into his financial condition and earnings, trial counsel for appellant objected. The jury may have found that appellant did not carry its burden of persuasion on the matter of mitigation of damages. It is clear, however, that the jury awarded appellee some $9,000.00 less than the full amount he was likely to earn under the contract.

It is said that the Chancellor erred in allowing counsel for the defendant to "repeatedly use leading and improper questions." Specific examples of such questions have not been called to this Court's attention in appellant's assignment or brief and this portion of the assignment thus does not meet the requirements of specificity contained in our Rules. Court of Appeals Rule 12. Cf. *Stacker* v. *L. & N. R. Co.,* 106 Tenn. 450, 61 S.W. 766 (1901).

Appellant contends that the Chancellor erred in refusing to allow the jury to take the contract between the parties into the jury room as requested by the jurors. The Chancellor was correct in refusing the jury's request. Our cases do not permit the jury to take exhibits to the jury room during deliberations on the grounds they are likely to be given undue weight as compared with other evidence. *Shappley* v. *Graves,* 9 Tenn. App. 567 (1929); *Sinard* v. *Harris,* 2 Tenn. Civ. App. 486 (1911). There was no agreement by the parties stipulating that the jury could take the contract into its deliberations.

Appellant argues that the Chancellor erred in rejecting the following special charge:

> That if defendant and cross-complainant is entitled to recover the balance due on his salary, it would be an amount less any amount earned or ought by reasonable diligence to have been earned, in any other employment.

It is further argued that it was error to give the following charge requested by appellee:

> I charge your gentlemen of the jury, that if you find that Metro Bolt and Fastener Corporation breached its contract of employment with the Defendant, William Coats, that the proper measure of damages for breach of contract of employment is the salary contracted for, less any payments and less any amount that was in the exercise of reasonable diligence, should have been earned by the said William Coats during the contract term, that is, I charge you that the proper measure of damages would be the salary agreed upon by the parties for the remaining term of this contract, less any payment made by the said Metro Bolt and Fastener Corporation or any salary that was earned by

BLEED THROUGH

> the said William Coats or should have been earned, in the exercise of ordinary and reasonable diligence. I further charge you gentlemen of the jury, that the burden would be upon Metro Bolt and Fastener Corporation in this action for breach of contract of employment to establish any matters that would mitigate damages to be recovered by Mr. Coats, such as earnings or other payments that he may have or should have received by the exercise of reasonable diligence during the remaining term of this contract. If you find that the said Metro Bolt and Fastener Corporation has not established any mitigation of damages as above charged you by the Court, then it will be your duty to award the full amount of salary agreed upon by the parties for the remaining term of this contract.

The charge given by the Chancellor was an accurate statement of the law and we find no error. See *Jeffers* v. *Stanley, supra.* The substance of appellant's special request was charged by the Chancellor and we find no error in its denial.

Finally, appellant claims that the trial court erred in "allowing the jury to completely disregard the uncontradicted proof that the defendant was supposed to train salesmen and failed to do so and thereby breached his contract." We see no merit in this assignment. The testimony of William Coats supports the jury's conclusion that Coats did not breach the contract in the manner alleged by appellant.

The Chancellor is affirmed. Costs of this appeal are taxed to appellant.

Affirmed.

/s/ Frank F. Drowota, III, Judge

Shriver, P.J., concurs.
Todd, J., concurs.

APPENDIX C

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(Supreme Court of Tennessee at Nashville)

Metro Bolt and Fastener Corporation,
Petitioner,
vs.
William Coats and Jean Coats,
Respondents.
} Wilson Eqiuty

(Filed November 17, 1975)

After consideration of the petition for writ of certiorari, the briefs of counsel and the entire record, we are of the opinion that the Court of Appeals reached the correct results.

The writ is accordingly denied at the cost of the petitioners.

PER CURIAM